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Phillip A. Alf v. State Farm Fire and Casualty : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PHILLIP A. ALF and KATHRYN B.)	
ALF,)	
)	
Plaintiffs and Appellants,)	
)	Case No. 900582
vs.)	
)	
STATE FARM FIRE AND CASUALTY)	Priority No. 16
COMPANY,)	
)	
Defendant and Respondent.)	

REPLY BRIEF

Appeal from Judgment entered in the Third Judicial
District Court of Salt Lake County, State of Utah
The Honorable Raymond S. Uno, presiding

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B. Authorities

Couch On Insurance, 2.d §1466 8

Plaintiffs and Appellants Phillip A. Alf and Kathryn B. Alf (Alfs) submit this Reply Brief in response to Defendant and Appellee State Farm Fire and Casualty Company's (State Farm) Brief of Respondent. The majority of State Farm's arguments raised in its brief are addressed in Alfs' original brief. However, Alfs will here amplify certain points and draw the Court's attention to several inaccuracies in the application of law contained in State Farm's brief in order to clarify the issues and define the proper resolution of these issues.

STATEMENT OF FACTS¹

1. Plaintiffs are individuals, husband and wife, residing in the City of Draper, Salt Lake County, State of Utah.

2. Defendant State Farm Fire and Casualty Company is a corporation licensed and authorized to conduct insurance business in the State of Utah.

3. On or about March 8, 1988, Plaintiffs, through Defendant's agent, Fred R. Jensen, purchased a home owners policy of insurance on their home and premises in Draper, Utah.

4. At all times material hereto, said policy was in effect.

5. On or about February 15, 1989, while said policy was in full force and effect, and during a time when the home was fully occupied by Plaintiffs and not under construction, the main water line to the home, in an area where it runs under the tennis court on said premises, and through the residence of the Plaintiffs,

¹These facts are taken verbatim from the January 17, 1990, Stipulated Statements of Fact, R. 40-41 (Stipulated Facts).

froze and burst as a result of unusually low temperatures occurring in the County of Salt Lake, State of Utah.

6. As a result of the freezing and bursting of the main water line, large volumes of water escaped from the water line causing extensive flooding and washing away of the earth under the tennis court, driveway, fences and other structures on Plaintiffs' premises and causing damage to those structures.

SUMMARY OF THE ARGUMENT

The lower court erred, as a matter of law, in its summary judgment ruling because Village Inn v. State Farm is not determinative of the issue of law before this Court because it does not address efficient proximate cause. Alfs advanced the efficient proximate cause argument in the lower court, the lower court based its summary judgment ruling entirely on the Village Inn case, and Village Inn does not address the issue of efficient proximate cause. According to the stipulated Statement of Facts and the Findings of Facts, the efficient proximate cause is the "freezing and bursting of the main water line."

Further, summary judgment as decided, was improper because the determination of efficient proximate cause is a factual issue properly decided by the trier of fact. Efficient proximate cause is the law in Utah, the determination of efficient proximate cause is a matter for the trier of fact, and the stipulation of the parties does not support a determination that earth movement was the efficient proximate cause. Therefore, Summary Judgment as decided was improper.

ARGUMENT

Point I

The Lower Court Erred, as a Matter of Law, in its Summary Judgment Ruling because Village Inn v. State Farm is Not Determinative of the Issue of Law Before This Court Because it Does Not Address Efficient Proximate Cause

Alfs requested that the Lower Court apply the efficient proximate cause rule to resolve the relevant issue: Did earth movement cause the damage or was the damage caused by the "freezing and bursting of the main water line." In other words, where one cause ("freezing of a plumbing . . . or sprinkler system"²) is covered and the other possible cause ("earth movement"³) was excluded, which was the efficient proximate cause? Even though there is ample basis in the Statement of Facts to make a finding of fact and conclusion of law that the "freezing and bursting of the main water line" was the efficient proximate cause, the Lower Court side-stepped this issue, made no finding of fact or conclusion of law relating to efficient proximate cause, and based its ruling entirely on the Village Inn case--a case which does not even address efficient proximate cause.

A. Alfs Advanced the Efficient Proximate Cause Argument in the Lower Court

Alfs argued in their Opposition Memorandum at Summary Judgment⁴ and again in their Brief on Appeal⁵ that the efficient

²Home Owner's Extra Policy, §I-Losses Insured, ¶14.

³Home Owner's Extra Policy, §I-Losses Not Insured, ¶2b.

⁴March 26, 1990, Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 17-20.

proximate cause of the damage was "the freezing and bursting of the main water line."⁶

The parties have stipulated:

As a result of the freezing and bursting of the main water line, large volumes of water escaped from the water line causing extensive flooding and washing away of soil undermining the tennis court, driveway, fences and other structures on Plaintiffs' premises and causing damage thereto.⁷

B. The Lower Court Based its Summary Judgment Ruling Entirely on the Village Inn case

It is also undisputed that the lower court squarely rested its Summary Judgment ruling on the Village Inn Apartments v. State Farm Fire and Casualty Company⁸ case. The lower court concluded, as a matter of law:

The Court finds that the case of Village Inn Apartments v. State Farm Fire and Casualty Company, 131 Utah Adv. Rpt. 92, is governing and there is no coverage for Plaintiffs' losses and Defendant is entitled to judgment as a matter of law.⁹

C. Village Inn Does Not Address the Issue of Efficient Proximate Cause

However, Village Inn does not address efficient proximate cause. Village Inn does not even mention the phrases "efficient proximate cause" or "proximate cause."

⁵Brief on Appeal, pp. 9, 12-13.

⁶Stipulated Facts, ¶6.

⁷Id.

⁸790 P.2d 581 (Utah App. 1990).

⁹November 14, 1990, Conclusions of Law, ¶1.

Simply put, the lower court erred in its reliance upon Village Inn as a basis for granting Summary Judgment in favor of State Farm. The unresolved and unaddressed relevant issue is whether the "predominant or efficient proximate cause of the loss was the accidental freezing and bursting of the plumbing system,"¹⁰ which, it is undisputed, is a peril clearly covered by the policy:

SECTION I - LOSSES INSURED
COVERAGE B - PERSONAL PROPERTY
We insure for accidental direct physical loss to property described in coverage B caused by the following perils, except as provided in SECTION I - LOSSES NOT INSURED:

14. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system, or a house-hold appliance¹¹.

D. According to the Stipulated Statement of Facts and the Findings of Fact, the Efficient Proximate Cause is the "Freezing and Bursting of the Main Water Line"

There can be no question as to what caused and the other secondary causes and set them in motion in this case. The Stipulated Facts recite, "As a result of the freezing and bursting of the main water line . . ." soil washed away. Therefore, the proximate cause of the damage--as stipulated by the parties--was the frozen and broken pipes. The frozen and broken pipes caused and set in motion in the other subsequent and secondary causes which--although they were closer to the damage--were nevertheless "a result" of the broken and frozen pipes.

¹⁰March 26, 1990, Opposition Memorandum, p. 17.

¹¹November 14, 1990, Findings of Fact, Ex. A, Your State Farm Homeowners Extra Policy.

The issue of efficient proximate cause is not new to the courts and, accordingly, several cases have dealt with it.

For example, in a recent case, State Farm Fire and Casualty Company v. Von Der Lieth,¹² the homeowners asserted that their "all risk" policy should cover loss due to third party negligence. However, State Farm claimed the more immediate cause of the damage was earth movement and water damage, both items excluded under the policy. In the Van Der Lieth case, there were "several causes of the loss: (i) earth movement caused by rising ground water levels, and (ii) negligence of certain entities parties in failing to take proper measures to preserve the mesa."¹³ The California Supreme Court, in reversing its Court of Appeals and holding for the homeowners, stated:

When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk is the efficient proximate cause of loss. . . . [T]he loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause.¹⁴

Once again, the stipulated facts of the case which is now before this Court state that the efficient proximate cause--the "as a result" cause--was the freezing the bursting of the main water line, which cause is a covered peril. Therefore, according to the Van Der Lieth rationale, Alfs' damages should be covered under the

¹² 2 Calf. Rptr. 2d 183 (Calf. 1991).

¹³ Id. at 189.

¹⁴ Id. at 189.

policy because a covered peril, a frozen and broken water line, was the efficient and proximate cause of the damage.¹⁵

As another example, in Garnett v. Transamerica Insurance Services,¹⁶ the Idaho Supreme Court was called upon to examine a similar issue. The policy in that case contained a lead-in clause similar to the one now before the Court which purportedly excluded losses "occasioned directly or indirectly by enforcement of any ordinance or law."¹⁷ The insurer had denied coverage because certain repairs to the damaged property were required by a building code.¹⁸ In finding for the insured, the Court held:

As we read this provision it does not limit Transamerica's obligation for the cost of repair or replacement of the building when a loss has occurred that is covered by the policy, but merely states if the loss itself is caused by an ordinance or law, there is no coverage. For instance, if some safety improvement of a building to which no other loss had occurred were required by an ordinance or law, Transamerica would not be liable. However, when the cost of repairing or replacing a building that had been damaged by fire is increased by the requirements of an ordinance or law, Transamerica is not relieved of that cost.¹⁹

¹⁵See also Garvey v. State Farm Fire and Casualty Co., 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989) (when determining whether insurance coverage exists under an "all-risk" homeowners policy when the loss to the insured property can be attributed to two causes, one of which is a non-excluded peril, and the other is an excluded peril, the courts are to find coverage only if the non-excluded is the efficient proximate cause of the loss).

¹⁶800 P.2d 656 (Idaho 1990).

¹⁷Id. at 662

¹⁸Id.

¹⁹Id. at 666.

The Idaho Court's analysis is that where the loss is the proximate result of a covered peril, then the lead-in clause does not operate to preclude coverage. However, if the sole or proximate cause of the loss were an excluded peril, then there would be no coverage.

The same analysis should be applied in the case now before this Court. The proximate cause of Alfs' loss was a covered peril, the bursting of a water pipe. The lead-in clause should not be applied to defeat coverage when the excluded event, earth movement, is not the sole or proximate cause of the loss.

Point II

Summary Judgment, as Decided, was Improper Because the Determination of Efficient Proximate Cause is a Factual Issue Properly Decided by the Trier Fact

A. Efficient Proximate Cause is the Law in Utah

The Efficient Proximate Cause Rule is set forth in Couch On Insurance 2d:

In determining whether a loss is within an exception in a policy, where there is a concurrency of different causes, the efficient cause--the one that sets others in motion--is the cause to which the loss is to be attributed, even though the other causes may follow it, and operate more immediately in producing the disaster.²⁰

In this case now before this Court, the movement of the earth may have operated more immediately in producing the damage, but the predominating or efficient proximate cause of the loss was the accidental freezing and bursting of the plumbing system.

²⁰Couch On Insurance 2.d §1466 (emphasis added).

The Utah Supreme Court has recognized this efficient proximate cause analysis and applied it to determine the efficient proximate cause when multiple, potential causes of damage are advanced:

The standard definition of proximate cause is "that cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the injury."²¹

In Koncilja v. Trinity Universal Insurance Co.,²² the Colorado Supreme Court dealt with the identical issues which are now before this Court. In the Koncilja case, the home owners policy insured against loss occurring as a result of accidental discharge, leakage or overflow of water from a plumbing system. A broken water pipe caused water to soak into the ground beneath the house causing the ground to subside and the house to settle and crack. Coverage was denied on the basis of an exclusion clause containing the following:

(2) caused by, resulting from, contributed to, or aggravated by any earth movement including but not limited to earthquake, volcanic eruption, landslide, mud flow, earth sinking, rising or slightly;

(3) caused by, resulting from, contributed to, or aggravated by any of the following:

· · ·
(c) water below the surface of the ground.²³

²¹Mitchell v. Pearson Enterprises, 697 P.2d 240, 246 (Utah 1985) (quoting State v. Lawson, 688 P.2d 479, 482 (Utah 1984)).

²²528 P.2d 939 (Colo. App. 1974).

²³Id. at 940.

In the Koncilja case, the trial court held that the loss had been proximately caused by water escaping within the plumbing system and was therefore a covered loss. It construed the exclusion to apply only to underground water which had not escaped from the domestic system or to earth movements caused by anything other than accidental discharge from this system. In confirming the lower court, the Colorado Supreme Court held:

When, in determining coverage, the policy provisions are inconsistent, or when read together they give rise to an ambiguity as to the extent of the policy coverage, the contract should be construed in favor of coverage and against limitations which would inure to the benefit of the insurance company which, by their draftsmanship created the ambiguity. This principle is applicable to coverage as well as to exclusions and conditions.

. . . Additionally, if the insurer intended to omit from coverage that part of the plumbing system which is below the surface of the ground when it specifically insures the overall plumbing system, it should have done so expressly.²⁴

Likewise, in King v. Travellers Insurance Co.,²⁵ the New Mexico Supreme Court analyzed an insurance policy's coverage where the policy covered damages to due an accidental discharge from within a plumbing system and an exclusion with regard to water below the surface of the ground. The parties in the King case stipulated that a galvanized line under the floor broke allowing water to escape and erode the soil, causing the floor to buckle. The insurance company argued that the break in the line was caused

²⁴Id. at 941.

²⁵505 P.2d 1226 (N.M. 1973).

by electrolysis, a chemical reaction, and therefore was not an "accidental discharge," and the resulting damage was from water below the surface of the ground. In comparing the policy's statement of coverage with the policy's exception clause, the Court discussed two alternatives leading to the same result. The exception was either an irreconcilable conflict with and repugnant to the insurance clause, or must be so construed that its meaning will be harmonized with the insuring clause:

Appellee [insurance company] ignores the fact that a great part of many plumbing systems, by necessity, are installed below the ground. Presumably, if an insurer desires to exclude from coverage that part of the plumbing system which is below the surface of the ground after specifically insuring the overall plumbing system, it could have done so.²⁶

This efficient proximate cause and "fair effect" positions have been accepted in the vast majority of jurisdiction where court's have confronted these identical issues.²⁷

²⁶Id. at 1232.

²⁷Ferndale Development Co., v. Great American Insurance Co., 527 P.2d 939 (Colo. 1974) (holding that the terms "flood" and "surface water" in an exclusion clause do not include water flooding from a broken valve on a city water line); Broome v. Allstate Insurance Co., 241 S.E.2d 34 (Ga. 1977); New Hampshire Insurance Co. v. Robertson, 352 So. 2d 1307 (Miss. 1977) (earth movement exclusion relates to natural forces, not from water leaking from a plumbing system); Hartford Accident and Indemnity Co. v. Phelps, 294 So. 2d 362 (Fla. 1974) (exclusion for "water below the surface" does not include coverage of a leak in underground plumbing system); Contanucci v. Reliance Insurance Co., 349 N.Y.S.2d 187 (N.Y. 1973) (exclusion for "water below the surface" does not include coverage for a broken a sewer line); Thompson v. Occidental Life Insurance Co., 513 P.2d 353 (Cal. 1973); Mountain States Mutual Casualty Co. v. North Eastern New Mexico Fair Association, 508 P.2d 588 (N.M. 1973); Outdoor World v. Continental Casualty Co., 594 P.2d 546 (Az. 1979).

B. Determination of Efficient Proximate Cause is a
Matter for the Trier of Fact

The lower court had a basis for determining that the broken water pipe was the efficient proximate cause of the damage. However, the lower court had no basis in the stipulated facts and the findings of fact for a conclusion of law that earth movement was the efficient proximate cause.

Because the question of whether an included risk or an excluded risk was the efficient proximate cause of the damage is a question for the trier of fact, the lower court erred in granting summary judgment for State Farm. "Coverage should be determined by a jury under an efficient proximate cause of analysis. Accordingly, bearing in mind the facts here, we conclude the question of causation is for the jury to decide."²⁸ In the Von Der Leith case, the California Supreme Court reiterated, "{T}he question of what caused the loss is generally a question of fact, and the loss is not covered if the covered risk is only a remote cause of the loss, or the excluded risk was the efficient proximate or predominate cause."²⁹

C. The Stipulation of the Parties does not
Support a Determination that Earth Movement
was the Efficient Proximate Cause

²⁸Garvey v. State Farm Fire and Casualty Co., 770 P.2d 704, 48 Cal. 3d, 395, 257 Calf. Rptr. 292, 302-303 (1989).

²⁹ Von Der Leith, 2 Calf. Rptr. 2d 183, 189 (Cal. 1991).

The parties stipulated to certain facts.³⁰ The only facts that relate to the issue of efficient proximate cause are as follows:

5. On or about February 15, 1989, while this policy was in full force and effect, and during a time when the home was fully occupied by Plaintiffs and not under construction, the main water line to the home, in an area where it runs under the tennis court of the Plaintiffs' and to the residence, froze and burst as a result of unusually low temperatures occurring in the County of Salt Lake, State of Utah.

6. As a result of the freezing and bursting of the main water line, large volumes of water escaped [sic] from the water line causing extensive flooding and washing away of soil undermining the tennis court, driveway and fences and other structures on Plaintiffs' premises and causing damage thereto.³¹

As argued in the first point of this brief, the only plausible interpretation of these stipulated facts, according to the definition of efficient proximate cause,³² is that the frozen pipe was the efficient proximate cause of the damage. For the lower court to have ruled otherwise--if it even addressed the issue of efficient proximate cause somewhere between the lines--the lower court had to have made a factual determination that the frozen, broken pipe was not the efficient proximate cause and that the earth movement was the efficient proximate cause.

³⁰Statement of Facts, R. 40-41.

³¹Id.

³²See definition of Efficient Proximate Cause, infra. n. 20 and accompanying text.

In other words, the lower court had (and this Court has) the stipulated facts upon which it can rule that the frozen broken pipes are the efficient proximate cause of damage. The stipulated facts state that the damage occurred "as a result of the freezing and bursting of the main water line."³³ However, there is no basis in the Stipulated Facts upon which the lower court could rule that earth movement was the efficient proximate cause. Therefore, the lower court, without ignoring the application of efficient proximate cause, could not have properly decided this factual issue. For the lower court to decide how it did, it had to either (1) ignore the application of efficient proximate cause or (2) make a determination of fact which was not supported by the parties' stipulation or the findings of fact.

Therefore, Summary Judgment as decided was improper.

CONCLUSION

The Utah Supreme Court has stated:

An insured is entitled to the broadest protection he could have reasonably understood to be provided by the policy.³⁴

This mandate should underscore this Court's consideration of these issues presented on appeal.

The lower court erred, as a matter of law, in its summary judgment ruling because Village Inn v. State Farm is not determinative of the issue of law before this Court because it does

³³Stipulated Facts, ¶6.

³⁴Fuller v. Directors of Finance, 694 P.2d 1045, 1047 (Utah 1985).

not address efficient proximate cause. Alfs advanced the efficient proximate cause argument in the lower court, the lower court based its Summary Judgment ruling entirely on the Village Inn case, and Village Inn does not address the issue of efficient proximate cause. According to the stipulated statement of facts and findings of fact, the efficient proximate cause is the "freezing and bursting of the main water line."

Further, summary judgment, as decided was improper because the determination of efficient proximate cause is a factual issue properly decided by the trier of fact. Efficient proximate cause is the law, the determination of efficient proximate cause is a matter for the trier of fact, and the stipulation of the parties does not support a determination that earth movement was the efficient proximate cause. Therefore, Summary Judgment as decided was improper.

We therefore respectfully request a reversal of the lower court's summary judgment ruling, a ruling that the frozen and broken pipes were the efficient proximate cause of the damages, an application of the strictissimi juris rule against State Farm and a remand to determine damages.

Dated this 27th day of July, 1992.

FETZER, HENDRICKSON & SIMONSEN


Patrick S. Hendrickson

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing
REPLY BRIEF was mailed, postage prepaid, on this 27th day of July,
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